***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-7473

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

BOISE CASCADE CORPORATION,

Plaintiff-Appellant,

- against -

E. TODD WHEELER and THE PERKINS & WILL PARTNERSHIP,

Defendants-Respondents.

---

To be argued by
Louis H. Willenken

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6072 (LFM)

---

# BRIEF FOR APPELLANT

---

REID & PRIEST
ATTORNEYS-AT-LAW
40 WALL STREET
NEW YORK, N. Y. 10005
212 344-2233

TABLE OF CONTENTS

Pages

TABLE OF CASES

Pages

TABLE OF FEDERAL RULES Pages



TABLE OF OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - x

BOISE CASCADE CORPORATION, :

Appellant, : 75 Civ. 6072 (LFM)

- against - :

E. TODD WHEELER and THE PERKINS & WILL PARTNERSHIP, : APPELLANT'S BRIEF

Respondent. :

- - - - - - - - - - - - - - - - - - - x

## PRELIMINARY STATEMENT

Hon. Lloyd F. MacMahon rendered the decision appealed from.

## STATEMENT OF ISSUES

1. Was This Action Correctly Instituted Solely by Boise?

2. Is the District Court Incorrect on the Law and the Facts?

## STATEMENT OF THE CASE

Boise Cascade Corporation ("Boise") is a Delaware corporation with its principal place of business in Idaho. (Appendix pp. 64, 293, and 302-03.)

Boise was the sole owner of all outstanding stock of Walter Kidde Constructors, Inc. ("Kidde"), the contractor for a construction project in Hartford, Connecticut ("Project") prior to February 1973. (Appendix pp. 294, 38-40, 41-42, 241, and 101.) The architect for the Project was E. Todd Wheeler and the Perkins & Will Partnership ("Perkins & Will"). (Appendix pp. 294, 102.)

By a February 1973 Sale Agreement Boise sold all Kidde Stock to A.M. Kinney, Inc. ("Kinney"), but Boise retained substantially all of Kidde's assets and liabilities, including the right to the proceeds of all claims arising out of the Project, which Boise agreed to complete at Boise's expense. (Appendix pp. 294, 241-51 esp. pp. 247-248 and 250.) The February 1973 Sale Agreement also provided for the use of Kidde's name by Boise for certain litigation arising out of Kidde's work (Appendix pp. 247, 310-11 and 294-96.) Principally, Kinney acquired a corporation eligible to perform certain activities in New York under a statutory grandfather clause plus a valuable corporate name. The February 1973 Sale Agreement also provided that Boise would hold Kidde harmless for construction activities and litigation performed by Boise in Kidde's name. (Appendix pp. 294-95, 248 and 250.)

After February 1973 Boise, not Kidde, dealt with the Owner and with Perkins & Will, completed what little construction of the Project remained, and was the victim of continuing wrongful acts of Perkins & Will. (Appendix pp. 297, 312-14, 315, 100, 316-17, 318, 329-31.) Boise paid the taxes on all proceeds of

claims arising out of work done by Kidde prior to February 1973 where such proceeds were received after February 1973. (Appendix pp. 297, 97-98.)

In a related action involving Perkins & Will, the Supreme Court, New York County, found that Boise is the real party in interest on claims arising out of the Project being arbitrated in Kidde's name against the owner since 1972. The Mount Sinai Hospital of Hartford, Connecticut v. Walter Kidde Constructors, Inc., (N.Y. Sup. Ct., Index No. 16122/ 1972, Nov. 10, 1975; Postel, J.)(at 2). (See Appendix pp. 298, 321, 323, 327.) By the instant suit, Boise seeks to recover from Perkins & Will for fraud, negligence and intentional wrongdoing which goes beyond the matters at issue in the related arbitration. (Compare Appendix pp. 27, 30 and 32 with pp. 111, 171 and 175-176.)

Neither Kidde nor its parent corporation, Kinney, has any interest in or control over the claim herein. (Appendix pp. 247-48, 300, 294-296.) Indeed, in the affidavit of Mr. A. M. Kinney, Chairman of the Board of Kinney and Director of Kidde, Kinney expresses both its understanding that Boise is not required to bring suit in Kidde's name and its willingness to waive any requirement that the suit be brought in Kidde's name. (Appendix pp. 310-11, 296; see also Mr. Dornbusch's recollection at Appendix p. 60.) Kidde has nothing but a right to be held harmless for any costs or liabilities arising out of this suit, and its Board of Directors have acquiesced in the 1973 Sale Agreement between Boise

and Kinney by allowing the construction to be completed with Kidde personnel at Boise's expense and by passing a resolution allowing a Boise officer to act as a Kidde officer in furthering Kidde's rights under the 1973 Sale Agreement to be held harmless. (Appendix pp. 308, 314.)

The court below dismissed the action for lack of subject matter jurisdiction because it found that Kidde was an indispensable party, and apparently held that Kidde was indispensable as a plaintiff, thus destroying diversity of citizenship. (Appendix p. 368.)

## ARGUMENT

### I

### THIS ACTION WAS CORRECTLY INSTITUTED SOLELY BY BOISE

#### A. The Terms Of The February 1973 Sale Agreement

Paragraph 11 of the 1973 Sale Agreement between Kinney and Boise provides that Boise is entitled to all proceeds from claims arising out of Kidde's work, that Boise is liable for all damages adjudged or awarded in connection with such claims, and that Boise is obligated to hold Kinney and Kidde harmless for any loss in connection with such claims. (Appendix pp. 247-248.)

Paragraph 12 of the 1973 Sale Agreement provides for contracts designated as "category (a) contracts", which include

the Project which is the subject of the instant suit, to be completed with Kidde personnel with Boise paying all costs of completing the contracts to Kidde, Boise being entitled to all receipts under the contracts, and Boise holding Kidde harmless from any liability in connection with said contracts. (Appendix pp. 248, 250.)

Thus, Boise possesses all claims arising out of Kidde's work under the terms of the February 1973 Sale Agreement and possesses all claims arising after the February 1973 Sale Agreement as the party who was directly wronged by Perkins & Will while completing construction. Part of the instant suit concerns the claims arising out of Kidde's work, and the remainder concerns the wrongs committed against Boise. Hence Boise and not Kidde is the real party in interest in this suit.

B. Performance Of And Acquiescence In The February 1973 Sale Contract By Kidde

The February 1973 Sale Agreement was signed by Boise and Kinney, not Kidde. (Appendix p. 254.) However, Kidde engaged in a series of actions adhering to, acquiescing in, and ratifying the Agreement.

After February 1973, Kidde's officers resigned as required by the Agreement. (Appendix pp. 245, 272-83.) After February 1973, Kidde discontinued working on the Project and Kidde's employees for the Project left Kidde's employ and went onto the Boise payroll. (Appendix pp. 312-14, 297, 100.)

Kidde permitted Boise to take control of the Project and the claim and to receive the proceeds and to pay the taxes on the proceeds of other similar claims after February 1973. (Appendix pp. 297, 97-98, 315-18, 329-31.)

The Kidde Board of Directors on November 1, 1974 passed a resolution which specifically referred to the February 1973 Sale Agreement and which was specifically passed to further the performance of the February 1973 Sale Agreement. (Appendix pp. 307-08.) That resolution stated:

> "RESOLVED, that in view of the agreement by Boise Cascade Corporation to hold this corporation and A. M. Kinney, Inc., an Ohio corporation, harmless from any liability or loss arising from any acts or omissions by Thomas H. Gonser, as a Vice President of this corporation, ... Thomas H. Gonser be, and he hereby is, elected a Vice President of this corporation, to serve as such at the full expense and costs of Boise Cascade Corporation and for so long as necessary for the discharge of all obligations and the pursuit of any rights which this corporation may have in completing the category (a) contracts or in terminating the category (c) contracts referred to in the agreement between Boise Cascade Corporation and the said Ohio corporation dated February 2, 1973, ... provided that while the aforenamed Thomas H. Gonser occupies office as such Vice President his authority, powers and duties as such Vice President shall be limited to the matter of discharging the obligations and pursuing the rights of this corporation relative to completing said category (a) contracts and terminating said category (c) contracts, and to the matter of prosecuting and defending against said litigations and/or claims and he shall have no authority or right to act for or on behalf, or as an employee, agent, or representative of, this corporation, or to commit this corporation, or to draw upon any accounts of this corporation, except strictly within the scope of the matters to which his authority is hereinabove limited and as necessary to the exercise of that authority;" (emphasis added). (Appendix p. 308.)

The Kidde Board of Directors thus authorized Mr. Gonser to discharge all obligations and to pursue any rights which Kidde may have under the February 1973 Sale Agreement. (These rights are limited to Kidde being reimbursed by Boise for costs incurred and Kidde being held harmless by Boise for liabilities or expenses in connection with the claims. (Appendix pp. 41-54.) Kidde's obligation was to allow Boise to use Kidde's name. (Appendix pp. 247 and 310-11.) Since Boise, not Kidde, incurred the cost of completing the Project, the right to reimbursement for construction costs became moot when Boise placed the employees on the Project on its own payroll. Hence Kidde had no right which gave it any interest or control in this suit.)

At the same time as Kidde was adhering to, acquiescing in and ratifying the Sale Agreement, Perkins & Will began to correspond with former Kidde personnel "c/o Boise Cascade Company". (Appendix pp. 316-17.) The Owner also began corresponding with Boise. (Appendix pp. 329-31.) Later, in 1975, when the full terms of the Sale Agreement were revealed to the Owner and to Perkins & Will, they both took the position that Boise is the real party in interest in claims arising out of the Project. (Appendix pp. 298, 321, 323, 327 and 346-47.

C. Perkins & Will Is Collaterally Estopped From Denying That Boise Is The Real Party In Interest

Boise is suing the Owner of the Project in arbitration in Kidde's name for breach of contract and extra work. (Appendix

pp. 171-72, 175-76.) The Owner is suing Perkins & Will for indemnity in the same arbitration. (Appendix 179-81.)

In October 1973, the Owner moved in Supreme Court, New York County to disqualify an arbitrator who disclosed a prior minimal contract with Boise. (Appendix p. 298.) Perkins & Will supported the motion with an affidavit which refers to the arbitrator's contact with Boise and states that Boise is the "real party in interest" and the "true party in interest". (Appendix pp. 321, 323 and 327.) In December 1975, the Supreme Court, New York County, found that it was disclosed that Boise was the real party in interest and found that the arbitrator's prior contact with Boise was sufficient to disqualify the arbitrator. The Mount Sinai Hospital of Hartford, Connecticut v. Walter Kidde Constructors, Inc., supra (at 3); (Appendix p. 299.)

The finding by the state court that Boise is the real party in interest in claims arising out of the Project was necessary to the disqualification of the arbitrator and collaterally estops Perkins & Will from now claiming that Boise is not the real party in interest. See Springfield State Bank v. National St. Bank of Elizabeth, 459 F.2d 712 (3d Cir. 1972).

D. The February 1973 Sale Agreement Was Proper and Binding

Boise, as sole shareholder of Kidde, had the right and power to cause Kidde to transfer all claims arising out of the Project to Boise. If one ignores the acquiescence and adherence

to the February 1973 Sale Agreement and the prior finding of the state court, the question then becomes whether Boise could transfer the claim directly without the corporate formality of causing Kidde to make the transfer.

In New York, the sole stockholder is the equitable owner of the corporate property and is free to dispose of or encumber it as he sees fit. Zurlin v. Hotel Levitt, Inc., 5 A.D. 945, 172 N.Y.S. 2d 427, 429 (1958). In the Zurlin case the sole stockholder gave a mortgage on corporate property to secure the purchase price of the corporation's stock without any formal corporate action. Similarly, Boise as the equitable owner of Kidde's assets was free to dispose of or encumber Kidde's assets as it saw fit, i.e., the 1973 Sale Agreement.

In an earlier case, Harry R. Roeder, Inc. v. Roeder, 236 App.Div. 87, 258 N.Y.S. 44 (1932), Mr. Otto Roeder, the sole stockholder, was for several years the beneficial owner of all the corporate property, although legal title was vested in the corporate body. Mr. Otto Roeder, without authority from the corporation, executed a deed conveying property of the corporation to another. Mr. Harry Roeder, president of the corporation, brought the action on behalf of the corporation to nullify the deed. The Appellate Division reversed the lower court and upheld the validity of the deed. Similarly, Boise, the sole stockholder, was the beneficial owner of Kidde property for several years, and Boise executed an agreement, in effect, conveying the interest in and control of corporate property, i.e., this claim.

The Roeder case also bears on the question of whether a sole stockholder can "pierce the corporate veil" for his own purposes. There, Mr. Otto Roeder's action was upheld. The instant case is even stronger because a court has previously "pierced the corporate veil" with respect to the 1973 Sale Agreement. Therefore, the validity and effect of the 1973 Sale Agreement should be confirmed.

New York has even gone so far as to hold that where a testatrix holding 99% of the corporation's stock treated corporate property as her own and disregarded the corporate set-up, the corporate fiction will be disregarded and the property dealt with and treated as the testatrix did. In re Stukalo's Will, 166 N.Y.S. 2d 478, 480 (Surr. Ct. 1957). A fortiori, where Boise as the sole stockholder disregarded the corporate set-up and treated Kidde's assets as its own, the corporate fiction should be disregarded.

More particularly, the law of New York in this factual situation is that Boise through the 1973 Sale Agreement became the real party in interest with respect to claims arising under the Project.

In The Mount Sinai Hospital of Hartford, Connecticut v. Walter Kidde Constructors, Inc., supra (at 3), the court stated:

> "At the [arbitration] hearing on October 7, 1975, it was revealed that Boise Cascade was the real party in interest as to the claims asserted by 'Kidde'". (At 2.)

The court further stated:

> "In considering this issue [of disqualification of an arbitrator] the court notes with interest the statement made by counsel for Kidde ... wherein he indicates that at a pretrial conference on August 8, 1975 he informed the arbitrators and the opposing counsel that Boise had disposed of its interest in Kidde but had retained the interest in the claim that was the subject matter of the arbitration proceeding." (At 4-5.)

Boise, in Kidde's name, had also moved to compel arbitration with the Owner and Perkins & Will over their objections in the hearing that Boise was the real party in interest and that they had no arbitration clause with Boise. The court stated:

> "The application by Kidde to compel arbitration is denied as moot." (At 7.)

This appears to mean that since the parties were arbitrating with full knowledge that Boise was arbitrating against the Owner in Kidde's name, no order compelling arbitration was needed.

This is not to say that the court below is incorrect in saying that the general rule is that a corporation's assets are distinct from its shareholders'. In Brock v. Poor, 216 N.Y. 387 (1915), the shareholder, owning less than 2% of the corporation's stock and claiming to act on behalf of only 85% of the stock, was not allowed to sue the corporation's officers directly for misappropriated corporate assets. However, merely because assets may be distinct does not necessarily mean that a sole shareholder lacks the power to transfer the corporation's assets directly.

It is also true that courts do not generally look beyond the corporate form to determine legal capacity to do business, Connecticut General Life Insurance Company v. Superintendent of Insurance, 10 N.Y. 2d 42 (1961), or to determine who is doing business in a particular state. Matter of Green, 231 N.Y. 237 (1921); People v. American Bell Telephone, 117 N.Y. 241 (1889). However, neither of these questions are at issue in the instant case.

This is a case in which the sole stockholder attempted to retain his corporation's assets when he sold its stock pursuant to the 1973 Sale Agreement. Whether the 1973 Sale Agreement is a conveyance, transfer or other transaction, this type of dealing with corporate assets by a sole shareholder was permitted in Harry R. Roder, Inc. v. Roeder, supra, and the other cases cited supra, at the time Boise and Kinney entered into the 1973 Sale Agreement. The question before this court is whether it will declare the 1973 Sale Agreement a nullity in respect to Boise's retention of the claims arising from Kidde's work.

E. Boise Was Directly Injured By Perkins & Will

The undisputed testimony of Arthur A. Dornbusch III, formerly one of Boise's General Counsel and also one of Kidde's Directors, and of Philip A. Sawyer, former Vice President of Kidde and an employee of Boise, indicates that Kidde personnel went on the Boise payroll to complete the Project shortly after the February 1973 Sale Agreement. (Appendix pp. 312-14, 100.)

Therefore, some of the wrongs committed by Perkins & Will were committed against Boise directly, and Boise suffered injury directly. For example, Perkins & Will's refusal to authorize the payment of $1,395,000 retainage from the end of 1973 to date, as requested by Boise personnel, was a wrong committed against Boise. (Appendix p. 31.) Also, Perkins & Will's refusal to rule upon the July 1973 claim presentation submitted by Boise personnel was a wrong committed against Boise (Appendix p. 31.) At this time, both Perkins & Will and the Owner were dealing with Boise as the real party in interest. (Appendix pp. 297, 316-17, 329-31 346-47.)

F. Diversity Depends On The Citizenship Of The Real Parties In Interest

FRCP 17(a) requires:

> "Every action shall be prosecuted in the name of the real party in interest."

Although Boise had the right under the 1973 Sale Agreement to bring actions in Kidde's name, Rule 17 requires Boise to bring this action in its own name.

Even if Kidde were named as a party plaintiff to the suit, its presence would not affect the jurisdiction of the court. Contrary to the lower court's holding that this position evidences a "flippant disregard for established law":

> "The general rule is that citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists; the presence of a nominal or formal party who is nondiverse is irrelevant for purposes of measuring the court's subject matter jurisdiction." 6 Wright & Miller §1556, at 710 (footnotes omitted).

In Hann v. City of Clinton, 131 F.2d 972 (10th Cir. 1942), holders of paving bonds issued by the city but not secured by lien assessments on the improved property brought suit in the name of the city, as provided by statute, to enforce the lien upon default in the payment of the bonds. In passing upon the question of whether diversity jurisdiction existed, the court characterized the city as "merely a formal party, not necessary to a complete adjudication of the controversy between the owners of the bonds on the one hand and the owners of the property covered by the assessment lien on the other." Id. at 981. Finding that there was diversity, the court stated that, "Jurisdiction is not ousted by the joinder or nonjoinder of mere formal parties." Id.

There are also cases involving relators where the entity holding the beneficial interest has been held to be the crucial party for diversity purposes. In Kansas City, Mo. ex rel. Gemco, Inc. v. American Concrete Forms, Inc., 318 F. Supp. 567 (W.D. Mo. 1970) the court held:

> "It is readily apparent from the foregoing that the monies which may be recovered by this suit would be paid to the use plaintiff and that Gemco, Inc. is the real party in interest who stands to benefit from any recovery in this case. ... It is apparent that the provision [here sued upon], as applied in this case, is for the benefit of the relator and that the City of Kansas is a 'nominal' or 'formal' party. Therefore the citizenship of Gemco, Inc. is controlling on the issue of citizenship. The 'nominal party plaintiff will be disregarded, and jurisdiction determined by the citizenship of the relator, when it appears that the latter

> is in fact the beneficial party in interest. Ex parte Nebraska, 209 U.S. 436, 28 S. Ct. 581, 52 L. Ed. 876.'" 318 F. Supp. 569-70.

Although the instant case is not ex relatione, Boise is the beneficial party in interest and Kidde would only be a "nominal" or "formal" party.

Likewise, in Salem Trust Co. v. Manufacturers' Finance Co., 264 U.S. 182 (1924), the Court was called upon to decide whether diversity existed in a suit where the petitioner and one respondent were citizens of Massachusetts and the other respondent was a citizen of Delaware. Petitioner and Delaware respondent each claimed to be entitled by assignment to the proceeds of a contract to construct engines, and the Massachusetts respondent was in possession of the proceeds without any claim to them. In determining that diversity existed, the Court characterized the status of the Massachusetts respondent as follows:

> "It has no interest in the controversy between the petitioner and the other respondent. Its only obligation is to pay over the amount deposited with it when it is ascertained which of the other parties is entitled to it." Id. at 190.

Finally, as one treatise has stated, "[t]o be 'interested' a party need not be personally affected by the result of the action, although he at least must exercise some control over it." 6 Wright & Miller §1556, at 713 (emphasis added) (footnote omitted). In the instant action, Kidde is neither personally affected by the result of the action, nor does it exercise any control whatsoever over the conduct of the litigation. Any other suit by Kidde against Perkins & Will would

actually be a suit by Boise, and the fear of multiple litigation by Boise or Kidde against Perkins & Will is entirely without foundation. When all rights to a claim reside in one party, courts generally have held that a party with only a nominal claim may not sue. 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil §1545 (1971); Cobb v. National Lead Co., 215 F. Supp. 48 (E.D. Ark. 1963). Kidde retains none of the rights or responsibilities attaching to the claim involved in the instant action.

II

## THE DECISION OF THE DISTRICT COURT IS NOT CORRECT ON THE FACTS

### A. Kidde Not An Indispensable Party

The court below erred in finding Kidde to be an indispensable party. (Appendix p. 368.) Rule 19 of the Federal Rules of Civil Procedure provides:

> "(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action ... .
>
> "(b) If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."

First, complete relief can be accorded among those already parties. In order to answer the question it is necessary to look to the effect that the arbitration and Kidde have upon relief in this action.

The arbitration is another proceeding by Boise to recover losses arising out of the Project. Boise's role as claimant in that arbitration is clear from the February 1973 Sale Agreement, the decision of the New York Supreme Court, and numerous affidavits in the record, including those of counsel for Perkins & Will. However, as Perkins & Will admits, Boise is not claiming against Perkins & Will in the arbitration but rather is claiming solely against the Owner. (Appendix p. 298.) This is not an unusual way to proceed. See Landgren v. Freeman, 307 F.2d 104 (9th Cir. 1962). Moreover, not only does this action include misrepresentation, intentional torts and other wrongdoing beyond the scope of the arbitration, but this action also includes claims which are not arbitrable for lack of any arbitration agreement with Perkins & Will. Thus, the arbitration should have no affect on relief in this action (except that Boise cannot recover twice and obviously substantial damages for wrongful acts of Perkins & Will in the course of its employment might overlap with damages for breach of contract or change by the owner.)

Kidde is merely the former party in interest in this action and the former and nominal party in interest in the arbitration, again as can be seen from the February 1973 sale agreement,

the decision of the Supreme Court, New York County, and various affidavits in the record. Under the holding of Harry R. Roeder, Inc., supra, Kidde is bound by the February 1973 Sale Agreement. Furthermore, Kidde is estopped from denying that Boise is the real party in interest if this court finds that Boise is the real party in interest based in whole or in part on the representations of counsel in the arbitration and related state court proceeding. After all, Kidde did commence the arbitration, allowed it to be continued in its name pursuant to the February 1973 sale agreement, and is bound by the proceedings. In any event, the possibility of relief herein which does not prevent an additional suit by Kidde against Perkins & Will is not a realistic problem at this late date. One of the reasons that an amended complaint was filed in this action was that the court wanted to have a clearer idea of whether the statute of limitations had run about a year ago.

Second, Kidde does not claim any interest relating to the subject of this action. Otherwise, Kidde would not have turned the arbitration over to Boise and would have been heard from long before now. Kidde's present parent knows of this action and furnished an affidavit that this action was properly brought by Boise. Hence Kidde is not a person described in subdivision (a)(1)-(2) of Rule 19, F.R.C.P. and cannot be an indispensable party.

If the 1973 Sale Agreement and Kidde's subsequent actions are treated as a transfer, then Kidde is not an indispensable party under Hill & Range Songs, Inc. v. Fred Rose Music, Inc., 58 F.R.D. 185 (N.Y. 1972). The case held that a transferor (assignor) is not an indispensable party.

If Perkins & Will believes it has claims against Kidde the responsibility for which was not conveyed to Boise, then Perkins & Will may bring in Kidde as a third-party defendant.

B. The Court Below Took Improper Action

If the court below believed that Kidde had some residual interest in the claims in this suit, (See Appendix p. 367), the court should have ordered that Kidde be made a party defendant. Boise is clearly claiming all of the interest in this suit, and would be entitled to declaratory judgment against Kidde to that effect. As a party defendant, Kidde would not destroy diversity. Thus under FRCP 19(a), the court should have ordered Kidde be made a party defendant to resolve any ambiquity in 1973 Sale Agreement.

If the court, after a proper trial between Boise & Kidde on the issues of the 1973 Sale Agreement, found that Kidde did have a residual claim against Perkins & Will, only then would it be appropriate for the court to find that Kidde was indispensable. Boise, however, can see no interest on the part of Kidde and the court below did not state what interest it believed Kidde had or claimed.

C. The State Court Proceeding

After February 1973, as previously seen, the owner and Perkins & Will knowingly dealt with Boise concerning the Project, and Boise completed construction. (Appendix pp. 297, 316-17, 329-31.)

In August 1975, at the first arbitration hearing, or executive session, counsel for Boise notified counsel for the Owner, counsel for Perkins & Will and the arbitrators that Boise was the owner of the claim in spite of the fact that it was in Kidde's name. (Mr. Justice Postel's decision in Mount Sinai Hospital v. Walter Kidde, supra, quoted at 10-11 hereof.)

In October 1975, one arbitrator disclosed that he had had prior business contact with Boise, although the amount of business was very small. See Mount Sinai Hospital v. Walter Kidde, supra, Id. Counsel for the Owner and counsel for Perkins & Will submitted affidavits to Supreme Court, New York County, arguing that the arbitrator should be disqualified for any contact with Boise as Boise was the "real party in interest" and the "actual claimant." (Appendix pp. 298, 321, 323, and 327.)

Counsel for Boise submitted affidavits to the Supreme Court in order to vacate a temporary stay. (Appendix pp. 338-48.) Counsel for Boise furnished the court with a copy of the February 1973 Sale Agreement (Appendix pp. 343-44) and argued from that agreement that Boise's interest in the claim was indirect. (E.g. Appendix p. 339.) That is, the claim was in Kidde's name

and Kidde personnel (being paid by Boise) had completed construction. The affidavits disclosed that Boise was to receive all proceeds from the claim and to remain liable for any damages. (Appendix p. 340.) Counsel for Boise argued the stay should be vacated pending a determination whether

> "one of the arbitrators, James E. Birdsall, should be disqualified for two prior contacts with a company which has an indirect interest in the outcome of the case and which contacts were not recent, nor continuing, nor substantial." (Appendix p. 339.)

Counsel for Kidde further stated:

> "In February 1973, when the Hospital construction was 98% complete, Boise, the parent company of Kidde, sold all of the outstanding stock of Kidde to A. M. Kinney, Inc. ('Kinney'). The terms of the sale agreement are included in the affidavit of Will M. Storey, Senior Vice President of Boise, annexed hereto as Exhibit I. Kinney agreed that Kidde would complete the construction of the Hospital; that the claim under the agreement between Kidde and the Hospital would be arbitrated in the name of Kidde at the expense of Boise, that Kinney would pay Boise all net and after taxes proceeds from said claim; and that Boise would be liable for any damages assessed in connection with the prosecution of said claim." (Appendix pp. 339-40.)

The point of the facts stated by counsel for Boise was that the arbitrator would see ex-Kidde personnel as witnesses and see Kidde as the named claimant. While he was informed of Boise's interest, the arbitrator would not be hearing people with whom he had any contact at Boise.

Although the state court was not confused about Boise's interest, Mount Sinai Hospital v. Walter Kidde, supra, the District Court apparently took Boise's affidavit in the state court proceedings to mean that Boise was representing that Kidde was still

interested in the case. No such statement was made, the February 1973 Sale Agreement showing Kidde's lack of interest was submitted, Boise informed the Court that it had informed the arbitrators that Boise was the real party in interest (See Mount Sinai Hospital v. Walter Kidde, supra, at 4-5), and no one reading the motion and opposition papers could reasonably think that anyone but Boise was the real party in interest.

The District Court also confused one of the statements just quoted herein from counsel for Boise so that it sounds like Boise argued that its contacts with the case, rather than contacts with the arbitrator, were not recent, nor continuing, nor substantial. The opinion below states:

> "In an affidavit filed with the Appellate Division, First Department, in opposition to the disqualification of the arbitrator, Kidde's counsel (who is also Boise's counsel in the present action) stated that Boise is 'a company which has an indirect interest in the outcome of the case and which contacts were not recent, nor continuing, nor substantial.'" (Appendix p. 366.)

The quote thus incorrectly combines two ideas: one concerning Boise's relation to that proceeding and another concerning Boise's relation to the arbitrator, by removing the antecedent to "which contacts". The contacts referenced are those of the arbitrator with Boise and not contacts between Boise and the case. (See correct language at p. 21 hereof.)

In any event, in December 1975 the Supreme Court, New York County, found that Boise was the real party in interest

and disqualified the arbitrator for the minimal prior contact with Boise. Mount Sinai Hospital v. Walter Kidde, supra.

Since December 1975, in the discovery in the instant action, it first appeared in the testimony of Philip A. Sawyer, past Vice-President of Kidde, that Kidde did not complete construction at Boise's expense, but rather Boise actually engaged the Kidde personnel to complete the Project itself. (Appendix pp. 312-14.)

It has been clear to everyone but the District Court that Boise has been the real party in interest in claims arising out of the Project since February 1973, whether or not Boise's ownership of the claims and contact with Mr. Birdsall were sufficient for a disqualification of that arbitrator.

D. The Resolution Of The Kidde Board Of Directors

The District Court quotes from a resolution of the Board of Directors of Kidde (dated December 1974) as follows:

> "authority, powers and duties as such Vice President shall be limited to the matter of discharging the obligations and pursing the rights of this corporation [i.e., Kidde] relative to completing [the Hospital construction project] ... ." [Emphasis added.] (Appendix pp. 364-64.)

The opinion then finds:

> "By their own terms, the resolutions grant the Boise employee authority to pursue Kidde's claims and therefore do not purport to transfer them to anyone." (Note that there were two successive resolutions with the same language.) (Appendix p. 365.)

However, had the District Court continued the quote a little further, the entire nature and meaning would have been different and clear. (Appendix p. 308.) As previously quoted herein, the resolution continues to state that the "rights" are those under the February 1973 Sale Agreement. Those rights are the right to be reimbursed by Boise for construction costs and the right to be held harmless by Boise for everything else. It is respectfully submitted that the resolution does not deal with rights or claims against Perkins & Will but only those against Boise.

Furthermore, the logic of the District Court opinion is inconsistent. By granting Boise the authority to pursue rights indicated in the February 1973 Sale Agreement, the Kidde Board of Directors accepted the terms of the February 1973 Sale Agreement. Kidde thus acquiesced in those terms. Indeed, the District Court found + Kidde pursued its rights under the February 1973 Sale Agreem - but did not accept the Agreement. (Compare Appendix p. 365 with p. 361.)

E. Issues Before The State Court

There was a non-assignment clause in the contract with the Owner which the District Court refers to in its opinion. (Appendix pp. 357 and 115.) When the Supreme Court disqualified the arbitrator, it also had before it a motion to compel arbitration over the objection that the non-assignment clause had been

violated. The Supreme Court ultimately denied the motion to compel as moot (as the parties were arbitrating) but some of the arguments on that question found their way into the District Court's opinion on this motion. For example, the District Court opinion quotes an affidavit of a Boise officer that:

> "the sale of the stock of Kidde by Boise to Kinney in February of 1973 occurred four years and four months after the contract between Kidde and the Hospital. ... The claimant [Kidde] is still the same viable legal entity that entered into the contract with the Hospital and is still engaged in construction work." (Appendix p. 366.)

When Boise decided to take the responsibilities for and proceeds from the Project, it made the transfer so that the same personnel were doing the construction work, but on Boise payroll (Appendix pp. 312-14); and the same resources, those of Boise, were behind the work. (See Appendix p. 247.) The transfer was done in a manner that the Owner would not have cause to complain nor be adversely affected. Indeed, the Owner and Perkins & Will then merely dealt with Boise. (Appendix pp. 297, 316-17, 329-31.)

However, while the Boise officers's and Boise counsel's affidavits argued that the non-assignment clause was not breached, (Appendix 342-43, 340), they did not argue that Kidde had any interest in the claim. No such argument was made. Indeed, the affidavit of the Boise officer quoted by the District Court opinion also states:

> "7. Pursuant to Section 12 of said sale agreement, Boise and Kinney agreed that Kidde would complete the Hospital project for Boise's account with Boise paying to Kidde the actual cost of completion. The pertinent part of Section 12 of the agreement reads as follows:

"(a) Contracts that the Seller desires to complete, or cause to be completed, for the Seller's account, namely, Mt. Sinai Hospital ... . The Seller shall pay to Kidde the actual cost (exclusive of profit) to Kidde of the performance of such contracts to the completion or termination thereof, shall be entitled to all receipts under such contracts, and shall hold the Buyer and Kidde harmless from any liability or loss arising from breach of such contracts or otherwise arising in connection with such contracts.

"8. In Section 8 of said agreement, Boise agreed to indemnify Kidde as follows:

"Indemnification. The Seller shall indemnify and hold harmless Kidde and the Buyer, at all times after the date of this Agreement, against, from, and in respect of (a) all liabilities of Kidde (and of its subsidiaries) of any nature, ...

"(b) contracts, or arising out of any contract or commitment entered into or made by Kidde, ...

"(c) all liabilities of, or claims against, Kidde ...

"(d) any damage or deficiency ... and

"(e) all actions, suits, proceedings, claims, demands, damages, assessments, arbitrations, judgments, and decrees, and all costs and expenses ... ."

"9. Boise agreed to hold Kidde harmless for claims arising out of work done by Kidde, in Section 11 of the agreement with Kinney, as follows:

"Claims. All existing and future claims by and against Kidde arising out of work performed by Kidde, ... The Seller shall be entitled to all net and after-tax proceeds from said claims and shall be liable to Kidde and the Buyer for all damages adjudged, decreed, awarded, or assessed against Kidde or the Buyer in connection with said claims. The Seller shall hold the Buyer and Kidde harmless from any loss in connection with said claims and assessments." (Appendix pp. 344-45.)

Perhaps if it ever becomes important, a court may determine whether the 1973 Sale Agreement operated as an assignment

or as something else which vested the ownership of Kidde claims in Boise. However, the Supreme Court was apparently satisfied either that the non-assignment clause was not breached or that the Owner waived its objection by dealing with Boise and proceeding to arbitration knowing Boise owned its claim, as the Supreme Court ordered that another arbitrator be appointed so that the proceeding could continue. Mount Sinai Hospital v. Walter Kidde, supra.

F. Starting De Novo In State Court Is Prejudicial

Motion practice and appeals in state court took over three years without beginning arbitration hearings against the Owner. (Compare Appendix p. 182 with p. 217.) The instant suit is almost a year old with no discovery having been taken by plaintiff. (Appendix p. 7.) The sums are great enough, the wrongs clear enough, and oppcsing counsel clever enough that commencing a suit now in state court eight years after construction started and three years after construction was completed would first have to endure all of the conceivable motion practice before attempting to probe witnesses' memories. All additional delay is severely prejudicial in a matter in which Boise was damaged by several million dollars.

Furthermore, permitting a decision to stand which conflicts with the plain language of the 1973 Sale Agreement and

conflicts with the 1975 decision of the Supreme Court, New York County, may create problems for Boise in the future should it seek to enforce its rights.

## CONCLUSION

For the foregoing reasons, the instant appeal should be granted, and the decision below reversed.

In the alternative, the District Court decision below should be modified to vacate the dismissal of the claim and to require Boise to join Kidde as a party-defendant for declaratory judgment purposes or as a nominal party-plaintiff.

REID & PRIEST
Attorneys for Plaintiff-
Appellant Boise
Cascade Corporation
40 Wall Street
New York, New York 10005

Of Counsel:
Louis H. Willenken
Stephen H. Kinney, Jr.

COPY RECEIVED

Feuerstein, Weiss, Parter, Coplan & Weinstein

ATTORNEYS FOR PW Bache Sub

DATE Nov 5, 1970

TIME 3:30

COPY RECEIVED

HUNT G. HOLME

ATTORNEYS FOR Bellanca Corp

TIME 3:35 P.M.